No. 88-732

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

HARRY B. HELMSLEY AND LEONA M. HELMSLEY,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

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1. On January 20, 1989, the United States Court of Appeals for the Second Circuit issued an opinion supporting its September 14, 1988 order dismissing this appeal for want of jurisdiction and denying mandamus. The decision of the court of appeals is set out hereafter at Appendix 1a-8a.[1] The court of appeals reasoned that

> [b]ecause a Rule 6(e) violation is not necessarily rendered harmless by a subsequent conviction, in which event it would be subject to post trial review, a ruling on such an asserted violation "does not qualify for immediate review under the collateral order doctrine."

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[1] "App." references are to the Appendix to this Brief. "Pet. App." references are to the Appendix to the Petition for a Writ of Certiorari filed in this case.

App. 4a-5a, quoting *United States v. Midland Asphalt Corp.*, 840 F.2d 1040, 1046 (2d Cir. 1988), *cert. pending*, No. 87-1905 argued January 17, 1989. The court of appeals noted that "[a] serious violation" of Rule 6(e) may deprive a defendant of a fair determination of guilt or innocence and that "[s]uch an impact may be reviewed after trial, alleviating any need for interlocutory appeal." App. 4a-5a. As a result, the court held that this case is not "within the limited class of exceptions to the rule of finality in criminal cases which have been accorded judicial recognition" and concluded that it "would not be justified in creating a further exception." App. 6a-7a.

The court emphasized that its dismissal of this interlocutory appeal "should not be considered condonation of any prosecutorial misconduct that may have occurred," and noted that the Department of Justice is investigating grand jury leaks that the district court found "rife." App. 7a.[2] It endorsed the district court's order that it be furnished with a complete report on the Department's investigation. The court of appeals, therefore, affirmed the district court's denial of petitioners' reqeust for a hearing on the allegations of prosecutorial misconduct on the ground that the prosecutors' misconduct could be the subject of a renewed motion at the conclusion of the investigation. *Ibid.* In addition, it denied petitioner's request that the application be treated as an application for mandamus, because it had already determined that "post-

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[2] The court of appeals referred to "Judge Lasker's statement, in his endorsement order denying pre-indictment relief . . . that '[l]eaks of pending indictments have become so commonplace as to make a mockery of the secrecy provisions of the grand jury,' and Judge Walker's comment, during the hearing on the motion whose denial is the subject of this appeal, that 'it appears to me that this case was rife with Rule 6 violations.'" App. 7a, n.4. The court pointed out that at least some information about the grand jury was disclosed by identified state authorities associated with the joint state and federal investigating team. It is also noted that "[n]umerous other press reports were attributed to anonymous law enforcement sources." *Ibid.*

trial review is available to remedy any prejudice defendants-appellants may suffer. . . ." App. 8a.

2. The government has agreed (Br. 4) with petitioners that the appealability issue in this case is the same one now before the Court in *Midland Asphalt*. It therefore concludes that the Petition for a Writ of Certiorari should be held and disposed of in light of the Court's forthcoming decision in *Midland Asphalt*. *Ibid.* But the government opposes petitioners' request (Br. 4, n.2) that this case be consolidated for consideration with *Midland Asphalt* contending that it would add little to the Court's resolution of *Midland Asphalt* and would delay disposition of that case.

3. Notwithstanding that oral argument has been held in *Midland Asphalt*, consolidating this case with *Midland Asphalt* or granting independent review, would provide the Court with a more complete understanding of the practical and recurring procedural problems raised by violations of F.R.Crim.P. 6(e) than will consideration of *Midland Asphalt* alone. As the government itself has strenuously argued,[3] *Midland Asphalt* involves only a technical violation of Rule 6(e)—indeed a violation that the government contends was precipitated by the *Midland* petitioners/defendants—a far cry from this case, which the district court below concluded is "rife with Rule 6 violations" that created "an atmosphere that is clearly counterproductive to these defendants obtaining a fair trial." App. 14a. The violations involve disclosures of allegations being considered by the grand jury, information heralding rumors of grand jury actions in advance of grand jury deliberations, and *ad hominem* attacks on petitioners by government personnel. These inflammatory disclosures were widely published often with attribution to unnamed government personnel in the

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[3] *See* Brief for the United States, *Midland Asphalt Corp., et al. v. United States*, No. 87-1905 at pp. 32-33.

New York tabloid press. Such abuse nullifies petitioners' constitutional right to indictment by an independent, unbiased grand jury.

4. The Fifth Amendment provides that:

> No person shall be held to answer for a capital, or otherwise infamous crime unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; . . .

In *Midland Asphalt*, the government, relying on *United States v. Mechanik*, 475 U.S. 66 (1986), has argued [4] that conviction by a petit jury always renders harmless misconduct or error in the grand jury's charging process.[5] But although technical breaches of Rule 6(e) such as the one arguably involved in *Midland Asphalt*, can be harmless, some grand jury irregularities—those that deprive a putative defendant of the right to consideration by independent, unbiased grand jurors—can never be rendered harmless by a conviction. For example, if the government skips the indictment process and charges a defendant by felony information, a conviction certainly cannot cure such a glaring violation of the Fifth Amendment. Indeed, an order denying a motion to dismiss prior to trial would surely be final and immediately appealable for the reasons interlocutory appeals were per-

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[4] *See* Brief for the United States, *Midland Asphalt Corp., et al. v. United States*, No. 87-1905 at pp. 20-22, 37-38.

[5] In *Midland Asphalt*, the government suggested that exceptional grand jury violations can be reviewed by the courts of appeals on petition for a writ of mandamus. *See* Brief for the United States, *Midland Asphalt Corp., et al. v. United States*, No. 87-1905 at p. 37 & n.26. In this case, a writ of mandamus was sought as an alternatvie to appeal but was denied by the court of appeals. This case, therefore, also places squarely before the Court the mandamus question not present in *Midland Asphalt* but suggested by the government as a possible alternative.

mitted in *Abney v. United States*, 431 U.S. 651 (1977) and *Helstoski v. Meanor*, 442 U.S. 500 (1979). It must follow that substantial deprivation of the right to an indictment by a grand jury would be subject to immediate appeal even if this Court were to conclude that violations of the type present in *Midland Asphalt* are not. The problem, of course, is identifying those errors which risk nullification of the grand jury clause. This case, much more than *Midland Asphalt* offers the Court an opportunity to consider the circumstances under which a violation of Rule 6(e) would result in effective deprivation of the right to indictment by a grand jury.

5. Surprisingly, the government also contends that the second question presented by the Petition—to what kind of inquiry into the extent of prejudice is the defendant entitled—is "not presented in this case." Br. 4. Yet it is beyond dispute that petitioners made a substantial showing of Rule 6(e) violations by the government and inflammatory disclosures that found their way into publications with widespread circulation. This showing resulted in the district court's conclusion that the grand jury process was "rife with Rule 6 violations." App. 14a. In the face of this evidence, it is surely reasonable to infer that these disclosures came to the attention of and influenced, the grand jurors who considered the indictment. But the court nevertheless denied petitioners' requests, both before and after indictment, to poll the grand jurors or to pursue further factual inquiry into information exclusively within the government's dominion and control.[6] This case, therefore, squarely presents the discovery issue—may a trial court deny petitioners' motion to dismiss because of failure to prove prejudice while at the same time depriving them

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[6] F.R.Crim.P. 6(e)(3)(C)(ii) provides for disclosure of grand jury information to a defendant "upon a showing that grounds may exist to dismiss the indictment because of matters occurring before the grand jury." The rule recognizes that defendants are entitled to disclosure of information necessary to make out or disprove a claim of grand jury abuse.

of a fair opportunity consistent with Rule 6 to establish prejudice. Again, this is an issue of recurring importance that is simply not presented in *Midland Asphalt*.

6. Although *Midland Asphalt* has already been argued, it would be possible to consolidate this case with it to permit the Court to consider more broadly the recurring and important issues requiring this Court's attention. To this end, petitioners remain willing to meet any expedited briefing schedule. In the alternative, if consolidation at this stage is considered inappropriate, we request that the Petition for a Writ of Certiorari be granted independently to resolve the additional and compelling issues presented in this case.

CONCLUSION

For the reasons stated here and in the Petition, the Petition for a Writ of Certiorari should be granted and this case consolidated for disposition with *Midland Asphalt v. United States*, or set for independent disposition.

Respectfully submitted,

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Date: January, 1989

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APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 297, 298

AUGUST TERM, 1988

Argued: September 14, 1988

Decided: September 14, 1988

Opinion: January 20, 1989

Docket Nos. 88-1325, 88-1326

UNITED STATES OF AMERICA,
Appellee,

-v.-

HARRY B. HELMSLEY, LEONA M. HELMSLEY,
JOSEPH V. LICARI and FRANK J. TURCO,
Defendants,

HARRY B. HELMSLEY and LEONA M. HELMSLEY,
Defendants-Appellants.

Before:

LUMBARD and MAHONEY,
Circuit Judges,

and CHOLAKIS,
*District Judge.**

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* The Hon. Con. G. Cholakis, United States District Judge for the Northern District of New York, sitting by designation.

Appeal from an order of the United States District Court for the Southern District of New York (John M. Walker, Jr., *Judge*) denying defendants-appellants' motion to dismiss the indictment or, in the alternative, to grant a hearing to determine the effect of publicity upon the action of the grand jury.

Appeal dismissed for want of appellate jurisdiction; mandamus denied.

JOHN R. WING, New York, New York, (Harris J. Yale, Weil, Gotshal & Manges, New York, New York, of counsel for Defendant-Appellant Harry B. Helmsley; Gerald A. Feffer, James A. Bruton, III, Eva M. Petko, Williams & Connolly, Washington, D.C., of counsel for Defendant-Appellant Leona M. Helmsley, *for Defendants-Appellants Harry B. Helmsley and Leona M. Helmsley.*

JAMES R. DEVITA, Assistant United States Attorney for the Southern District of New York, New York, New York (Rudolph W. Giuliani, United States Attorney for the Southern District of New York, Cathy Seibel, Celia Goldwag Barenholtz, Assistant United States Attorneys for the Southern District of New York, New York, New York, of counsel), *for Appellee.*

CHOLAKIS, *District Judge*:

On April 14, 1988, a grand jury in the Southern District of New York handed up an indictment charging Harry B. and Leona M. Helmsley, as well as Joseph V. Licari and Frank J. Turco, in 47 counts with tax evasion, false tax returns, mail fraud, extortion and conspiracy in violation of 26 U.S.C. §§ 7201 (1982) and 7206(1) and (2) (1982), and 18 U.S.C. §§ 2 (1982), 371 (1982), 1341 (1982) and 1951 (1982). Due to the Helmsleys' prominence, a great deal of media attention focused upon the grand jury's investigation during the period leading up to the indictment. As a result of the publicity, defendants Harry and Leona Helmsley filed a

motion seeking dismissal of the indictment or, in the alternative, a hearing into the effect of this publicity upon the grand jury considering this case. They alleged that the government was responsible for leaking information to the press concerning matters occurring before the grand jury in violation of Fed. R. Crim. P. 6(e)(2).

District Judge John M. Walker, Jr. denied their motion by order entered July 29, 1981,[1] and the Helmsleys brought this appeal. Based upon an upcoming trial date of September 26, 1988, the government moved for expedited consideration of the appeal. This motion was granted on August 1, 1988, and oral argument was heard in this matter on September 14, 1988. In their reply brief on appeal, the Helmsleys requested that if this court determined that an interlocutory appeal was unwarranted, the court treat this appeal as a petition for a writ of mandamus. An order was issued on September 14, 1988 dismissing the appeal for want of appellate jurisdiction and denying mandamus. This opinion sets forth our reasons.

Defendants-appellants maintain that, as a sanction against the government for its improper actions in disseminating grand jury information concerning this case, the indictment against them should be dismissed. They further contend that they are entitled to a hearing or, at a minimum, to a polling of the grand jury to determine the actual extent of the prejudice caused by the newspaper articles.

The first issue to be addressed is the appealability of Judge Walker's order. Defendants-appellants maintain that they are entitled to interlocutory review of Judge

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[1] A previous motion seeking, *inter alia*, an evidentiary hearing concerning prosecutorial leaks of grand jury matters to the press and termination of the grand jury proceedings against the Helmsleys was denied by Judge Morris B. Lasker in an endorsement order just prior to the filing of the indictment.

Walker's decision because, if the court refuses to review that determination, their right to an unbiased grand jury will be irretrievably lost, since the propriety of the grand jury indictment is not reviewable after conviction. They further contend that the issue has been conclusively decided and is separate from the merits of the action.

The government contends in opposition that intelocutory appeal is not the appropriate vehicle for review of the denial of defendants-appellants' motion to dismiss pursuant to Fed. R. Crim. P. 6(e). The government maintains that defendants-appellants may appeal the denial of that motion upon completion of any trial in this matter, but only at that juncture.

The general rule is that appeal may be taken to a court of appeals only from "final decisions of the district courts." 28 U.S.C. § 1291 (1982). A collateral order, however, is reviewable by means of interlocutory appeal if 1) it conclusively determines the disputed question; 2) it resolves an important issue completely separate from the merits of the action; and 3) it is effectively unreviewable on appeal from a final judgment. *United States v. Midland Asphalt Corp.*, 840 F.2d 1040, 1042 (2d Cir.) (citing *Coopers and Lybrand v. Livesay*, 437 U.S. 463, 468 (1978)), *cert. granted*, 108 S. Ct. 2869 (1988). In examining the appealability of a ruling with respect to asserted violations of Fed. R. Crim. P. 6(e), this court, after full consideration of the collateral order rule, has specifically held that such orders are not subject to interlocutory appeal. *Midland Asphalt*, 840 F.2d at 1046. The role of Rule 6(e) in the grand jury system is to protect society's interest in the secrecy of the grand jury. Because a Rule 6(e) violation is not necessarily rendered harmless by a subsequent conviction, in which event it would be subject to post-trial review, a ruling on such an asserted violation "does not qualify for

immediate review under the collateral order doctrine." *Id.*

The Helmsleys argue that the decision in *Midland Asphalt* is inconsistent with the Supreme Court's decision in *United States v. Mechanik*, 475 U.S. 66 (1986). In *Mechanik*, the Court reviewed a violation of Fed. R. Crim. P. 6(d), which prohibits anyone other than the person testifying, attorneys for the government, interpreters when needed and a stenographer from being present while the grand jury is in session. The Supreme Court determined that any error in allowing two agents of the Drug Enforcement Administration to testify in tandem before the grand jury was rendered harmless by a subsequent conviction. *Id.* at 70.

In *Midland Asphalt*, however, this court considered the Supreme Court's reasoning in *Mechanik*, and distinguished that decision from the case before it. The decision in *Mechanik* rested upon a Rule 6(d) violation, which only affects the charging of a defendant and does not go to guilt or innocence. *Mechanik* held that a subsequent conviction more than supports a finding of probable cause to charge, thereby precluding any post-trial challenge under Rule 6(d). *Mechanik*, 475 U.S. at 70;[2] *see Lopez v. Riley*, No. 88-2305, slip op. (2d Cir. Jan. 3, 1989) (applying *Mechanik* in habeas corpus proceeding under 28 U.S.C. § 2254 (1982)). A serious violation of Rule 6(e), on the other hand, may have the effect of depriving a defendant of a fair determination of guilt or innocence. Such an impact may be reviewed after

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[2] More recently, the Supreme Court made clear that a *pre-conviction* challenge may be made on the ground that errors in grand jury proceedings affected the decision to indict. *Bank of Nova Scotia v. United States*, 108 S. Ct. 2369 (1988). Since the motion to dismiss the indictment was granted by the district court in *Nova Scotia*, that case does not address the appealability of a denial of such a motion.

trial, alleviating any need for interlocutory appeal. *See Midland Asphalt*, 840 F.2d at 1046.

Defendants-appellants also contend that the decision in *Midland Asphalt* has been seriously undermined by this court's subsequent decision in *United States v. Friedman*, 854 F.2d 535 (2d Cir. 1988), a case dealing with alleged Rule 6(e) violations in the context of an appeal from final judgments of conviction. In *Friedman*, however, the defendants failed to show that any violations of Rule 6(e) which might have occurred[3] had any effect upon the petit jury and defendants' conviction. *Id.* at 584. Thus, the court ruled that any error which might have occurred was harmless, and upheld the district court's decision denying a motion to dismiss. *Id.* at 583-84. The court cited its earlier decision in *Midland Asphalt* as not barring a Rule 6(e) challenge when the resultant prejudice has an effect upon the determination of guilt or innocence. *Id.* at 583.

We therefore adhere to the holding of *Midland Asphalt* that interlocutory appeal is not available from pre-trial rulings on such questions. As we stated in *Midland Asphalt*:

> [A]dherence to the rule of finality is particularly important in criminal cases, "because 'the delays and disruptions attendant upon intermediate appeal,' which the rule is designed to avoid, 'are especially inimical to the effective and fair administration of the criminal law.'" *Abney v. United States*, 431 U.S. 651, 657, 97 S. Ct. 2034, 2039, 52 L.Ed.2d 651 (1977) (quoting *DiBella v. United States*, 369 U.S. 121, 126, 82 S. Ct. 654, 658, 7 L.Ed.2d 614 (1962)).

Midland Asphalt, 840 F.2d at 1042. This case does not fall within the limited class of exceptions to the rule of

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[3] The court assumed such violations *arguendo*. *Friedman*, 854 F.2d at 582.

finality in criminal cases which have been accorded judicial recognition, *see id.*, and we would not be justified in creating a further exception.

With respect to the Helmsleys' request for a hearing concerning the allegations of prosecutorial misconduct, we note that the Department of Justice is investigating the matter, and that Judge Walker has ordered that he be furnished with both a status report concerning that investigation and "a complete report of the investigation detailing the scope of the investigation, the findings and its conclusions." We agree with that procedure, and our dismissal of this interlocutory appeal is not to be considered a condonation of any prosecutorial misconduct that may have occurred,[4] an indication that it should be considered lightly, or a preclusion of any remedy that may appear appropriate upon completion of the investigation.

In the alternative, defendants request that if their appeal is dismissed, we treat the current application as a petition for a writ of mandamus. We are authorized to do so. *See Seguros Banvenez, S.A. v. S/S Oliver Drescher*, 715 F.2d 54, 56 n.1 (2d Cir. 1983); *Hartland v. Alaska Airlines*, 544 F.2d 992, 1001 (9th Cir. 1976). Mandamus is, however, an extraordinary remedy, which shall not issue absent compelling reasons of usurpation of power, clear abuse of discretion or an issue of first im-

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[4] We note in this connection Judge Lasker's statement, in his endorsement order denying pre-indictment relief, *see supra* note 1, that "[l]eaks of pending indictments have become so commonplace as to make a mockery of the secrecy provisions of the grand jury," and Judge Walker's comment, during the hearing on the motion whose denial is the subject of this appeal, that "it appears to me that this case was rife with Rule 6 violations." The indictment resulted from a joint investigation by federal and state authorities, and it is clear from the record that some information was supplied to the press by state, rather than federal, authorities. Numerous other press reports were attributed to anonymous law enforcement sources.

pression. *United States v. Coonan*, 839 F.2d 886, 889 (2d Cir. 1988). As noted above, the primary issue currently raised by defendants-appellants has already been decided by this court. Having determined that post-trial review is available to remedy any prejudice defendants-appellants may suffer, the application for mandamus must be denied.

The appeal is dismissed for want of appellate jurisdiction; mandamus is denied.